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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Estate of ROWENA L. SCHOOLER, Deceased

JOHN E. SCHOOLER et al.,

Respondents,

v.

JANE L. SCHOOLER,

Appellant.

D060251

(Super. Ct. No. PN28646)

APPEAL from orders of the Superior Court of San Diego County, Richard G. Cline, Judge. Affirmed.

Jane Schooler (Jane) appeals from a court order removing her as personal representative of her mother's estate and as successor trustee of trusts established by her deceased parents. (See Prob. Code, §§ 8500, subd. (b), 15642, subd. (a).)<sup>1</sup> Jane also challenges the court's order appointing an interim professional fiduciary (Gloria Trumble) to act as administrator of the estate and trusts while this appeal was pending. We reject Jane's appellate contentions and affirm.

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<sup>1</sup> All further statutory references are to the Probate Code.

## RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

There is a lengthy litigation history involving the parties before us (adult siblings). However, because the parties have designated only a very limited appellate record, we consider and discuss only the facts and procedure contained in this record.<sup>2</sup>

### *Background*

Rowena Schooler (Mother) died in 2004, several years after her husband's death. In trust and will documents, Mother left her assets (in equal value) to five of her grown children, Jane, Katherine, John, Andrew, and Louis (the latter three will be referred to as the "Brothers"). Mother designated Jane, an attorney, as the successor trustee of Mother's two trusts (Trusts) and the personal representative of her estate. The property in the Trusts consisted primarily of numerous parcels of undeveloped land in California and Nevada. The main asset of Mother's estate was a residence in Del Mar, known as the Del Mar beach house.

Three years after Mother's death, Jane filed a petition seeking to close the estate and distribute the estate assets to one of the Trusts. The Brothers objected, challenging the estate accounting and alleging Jane breached her fiduciary duties in various ways. The Brothers also filed numerous safe harbor petitions, one of which was the subject of a prior appeal, in which this court held the Brothers' objections to Jane's final account and

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<sup>2</sup> As detailed in footnote 5 below, we also take judicial notice of the court's December 16, 2011 order and statement of decision, but we rely on these documents only to show the fact of an evidentiary hearing in which the court resolved factual issues related to those on appeal. Additionally, certain undisputed background facts are derived from our prior unpublished appellate opinion in this case. (See *Estate of Schooler* (Jan. 26, 2010, D053924 (*Schooler I*)).

their petition to remove and surcharge Jane for alleged breaches of fiduciary duty did not constitute a contest under California law. (*Schooler I, supra.*)

*June 23 Hearing and July 12 Order*

About 18 months after the *Schooler I* decision, on June 23, 2011, the probate court held a hearing on various pending matters in the Schooler trust/estate litigation, including: (1) Jane's petition for final approval to close the estate; (2) the Brothers' petitions to remove or suspend Jane as personal representative, and to surcharge her for various wrongful acts, including breach of fiduciary duty and constructive fraud; and (3) Jane's former attorneys' motions to be paid from trust assets.<sup>3</sup> The hearing was attended by Jane (who represented herself), her sister Katherine (who was unrepresented), and the Brothers' counsel. The purpose of the hearing was for the court to rule on the parties' motions and to conduct a case management conference with respect to the remaining issues that would be litigated at a trial.

At the outset of the June 23 hearing, the court asked Katherine whether she wanted Jane removed, noting that her siblings have been "fighting" for about six or seven years, and most of the assets had not been distributed. Katherine responded "No . . . . My father was very bright and I know he picked [Jane] for a reason." The court and parties next discussed the Del Mar beach house. Although Jane denied the beach house was in default, the court stated the papers before it showed a notice of default had been filed on the property and there is an "actual sale date set [for the foreclosure]." The court then

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<sup>3</sup> The parties have not designated any of these written motions as part of the appellate record.

asked Jane numerous questions about the current appraised value and title status of the various undeveloped lots held by the Trusts. Jane was unable to provide information in response to many of these questions. Jane also acknowledged that she had filed a bankruptcy on behalf of one of the Trusts, but said the bankruptcy had been dismissed.

In asking these questions, the court noted: "One of the things I'm trying to do today is to figure out what can be solved immediately, and secondly, what procedural problems can be resolved, how I can wrap as many things up at one time as possible." Jane responded that a probate judge (Judge Gerald Jessop) had already ruled on the removal issue and both sides had extensively briefed the surcharge issues, and she was "willing to submit on it and we can get a ruling [today]." She said she "want[ed] to do the right thing" and that she had hired "good attorneys" and "good accountants" and "good appraisers" and she had "everybody looking over my shoulder." Jane said, "I would just submit on it and have you make the decision."

The court noted it had numerous matters before it in the consolidated trust/estate litigation, and asked "what do you want me to decide today — or soon?" The court and parties then discussed certain discovery disputes and the court set dates for Jane to serve discovery responses. The court also scheduled a three-day hearing to permit the parties to litigate the merits of their petitions, including Jane's petition for a final distribution and the Brothers' petition to surcharge Jane for various alleged breaches of fiduciary duty.

The court then asked "Anything else we can do today?" Brothers' counsel responded: "Yes. We have the petition for the removal and the order to . . . ." After an interruption by Jane, the Brothers' counsel continued: "[Jane] should be removed. . . . [¶]"

As you've heard today, she doesn't know the value of the assets. She can't at all tell you — she did not answer the question regarding bankruptcy at all in a coherent fashion. [¶] The [Del Mar beach house] is in disrepair and waste. [¶] . . . [Jane] should be removed so we can get somebody in there who can protect these assets, find out about these assets and see what is going on about these assets — immediately. [¶] Also, she should be compelled to account regarding the breaches of duty, the constructive fraud and the surcharge. That will be handled at the trial, I understand that. But as far as today, this petition has been sitting there. This party has no business being the trustee of these trust assets. She hasn't from day one, and she doesn't from this day forward, and this court should remove her forthwith."

The court gave Jane the opportunity to respond at length to these charges and defend her actions as trustee and personal representative. Jane's primary response was that another probate court judge had already denied the Brothers' petition for removal and that "if it expedites [matters] for the court, . . . I'll submit on the rest of that petition." Jane also discussed that her father had "envisioned" her running the business and "basically sending the rest of [her siblings] checks as property sold and the businesses made money." She said her plans to sell the undeveloped properties at a substantial profit were not realized primarily because of the financial downturn in the real estate market. She also said her Brothers resent her because her parents put her in charge and that she is "not responsible for the recession" and "for what has happened to the value of the propert[ies]."

After considering the parties' arguments and the written submissions (which Jane did not designate to be part of the appellate record except for the case management conference statement), the court concluded that for "good cause" it would remove Jane as trustee and personal representative on its own motion, citing sections 8500, subdivision (b) and 15642, subdivision (a). The court noted that after six years of litigation between Jane and the Brothers, the parties' "efforts" to resolve the disputes "have gone nowhere" and it is "obvious that this is a totally dysfunctional family." The court further found Katherine's interests have been adversely impacted by the siblings' actions. The court concluded that Jane's continued service "would be detrimental" to the Trusts and estate and "would only attract more litigation . . . and would continue to cause degradation in the value of the" assets.

With respect to the replacement trustee, the court rejected the Brothers' counsel's request that one of the Brothers be appointed, and found that none of the siblings was suitable to serve as trustee. The court said it would appoint a neutral independent representative to serve both as the personal representative and also as the trustee of the Trusts. The court directed the Brothers' counsel to provide Jane with three names of independent fiduciaries by July 5, and gave Jane the option of selecting one of these three proposed fiduciaries by July 15. The court said if there was any problem with this procedure, either side could schedule an ex parte hearing. Jane responded that there was no money to pay a trustee, and stated: "I would submit *on everything* and have you just make a ruling on a distribution, all of the pending motions, the attorneys' fee issue — everything. Just have you make a ruling . . . ." (Italics added.) Jane expressed concern

about a "full-blown" trial because of the expense. She said the superior court file is "extensive and it says a whole lot. I don't know why we need a trial to say the whole thing over again." However, after the court permitted the parties to confer, the court decided that a trial was necessary on the pending issues and scheduled a date for the trial.

Several weeks later, on July 12, the court issued a written order reflecting its rulings at the June 23 hearing, including its ruling removing Jane as trustee of the Trusts and personal representative of the estate.

#### *July 18 Ex Parte Hearing*

About one week later, on July 18, Jane and Brothers' counsel appeared at an ex parte hearing. At this hearing, the court found Jane had failed to comply with the court's discovery orders and ordered her to pay monetary sanctions. The court also selected a professional fiduciary, Gloria Trumble, as the successor trustee of the Trusts and the personal representative of Mother's estate, and ordered Jane to deliver all trust and estate documents to Trumble.<sup>4</sup>

#### *August 4 Ex Parte Hearing*

Several weeks later, at an August 4 hearing, Jane notified the court that she had appealed the court's discovery orders and the order removing her as trustee. Jane argued the appeal automatically stayed these orders and thus the court's appointment of Trumble as the successor trustee was null and void. After discussions with the parties, the court

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<sup>4</sup> Although the record is not entirely clear, it appears the court selected Trumble because Jane did not respond to the Brothers' list of three fiduciaries. Also, the minutes of the July 18 hearing indicate Jane was present, although in her appellate brief Jane claims she was not present.

agreed that Jane's appeal precluded it from appointing a successor trustee and that its prior appointment of Trumble was no longer valid. But the court noted that it had the authority under section 1310 to "appoint an *interim trustee* pending the resolution of the appeal . . . ." (Italics added.) The court stated that it would not appoint an interim trustee until it had provided the parties an opportunity to brief the issues.

*August 10 Ex Parte Hearing*

One week later, the court held the hearing on the issue of whether an interim trustee should be appointed. Jane, Brothers' counsel, and Katherine attended this hearing. After permitting the parties to argue the issues, the court concluded it would appoint Trumble as an interim trustee pending the appeal, reasoning that this appointment was necessary to prevent injury and loss to the estate and Trusts.

At this hearing, the court further clarified the reasons it had removed Jane as trustee and personal representative, stating in part:

"[There is] a strong inference . . . that Jane . . . has violated her fiduciary duty to exercise due diligence in the performance of her duties of carrying out the distributive provisions of the trust and estate. . . . [¶] . . . [¶] . . . The family is totally dysfunctional and unable to cooperate, and it appears that every act by one side appears to be opposed by the other, meaning the three brothers versus [Jane]. And the [Trusts and estate] face the potential of being overwhelmed by huge attorney fees and administrative claims related to the family dysfunction and controversy.

[Additionally], [Jane] revealed at the recent hearing that she filed bankruptcy petitions for the family trust in order to prevent foreclosure upon out-of-state property. It was represented that these facts were not previously known to the brothers. . . . [¶] . . . [¶] . . . These bankruptcies give rise to a strong inference that Jane . . . has failed to perform her duties of preserving estate assets.



Next item is Jane . . . as a fiduciary has actively resisted efforts by the brothers to obtain information and records regarding her actions as fiduciary, and this gives rise to a strong inference that Jane Schooler has violated her duty of loyalty and to avoid a conflict of interest.

Next there are assets of the respective estates that have ongoing expenses and potential revenue. And . . . there is a need for someone to manage these properties and to deal with whatever money or expenses there might be."

The court also made express findings that although Katherine was designated as a successor fiduciary in some of the estate documents, she was not suitable to serve in this position. The court explained: "[Katherine] is not represented by counsel, has never been represented by counsel [during the] six years of litigation. In spite of outstanding petitions to remove Jane Schooler as trustee and executrix, Katherine has not ever filed a petition [or] other pleading seeking the appointment upon a vacancy in office. And I note that the distribution of the trust assets to her contemplates that, I believe, her distribution is to be held in trust. And I also note that the controversy existing among the family is rather huge, complicated, and that the family, as a whole, is dysfunctional. [¶] And based on the foregoing, I find that Katherine would not be a suitable successor trustee or fiduciary . . . and there is an overwhelming need for an independent fiduciary."

In response to Jane's claims that Trumble was not neutral and appears to be aligned with the Brothers' counsel, the court stated that Trumble had the "duty of independence" and the court would closely monitor her actions.

*September 20, 2011 Notice of Appeal Filed*

In her amended notice of appeal filed on September 20, 2011, Jane stated that she was appealing from the court's June 23 and July 18 orders removing her as personal representative and appointing Trumble as successor trustee.

*December 16, 2011 Judgment*

Several months later, on December 6, the probate court held a trial on the Brothers' claims seeking to surcharge Jane for alleged acts of fraud and breach of fiduciary duty. The day before the trial, Jane filed an attorney substitution form withdrawing her attorney (who is now currently representing Jane on appeal) and then Jane did not appear at the trial.

After the trial, the court entered a judgment finding the Brothers had proved their breach of fiduciary duty and fraud claims and ordered the interim trustee (Trumble) to take various actions to sell/dispose of assets (including the Del Mar beach house) held by the estate and Trusts. The court also issued a lengthy statement of decision finding Jane "engaged in a course of conduct" to "personally enrich herself to the detriment of her siblings" and had caused substantial harm to her siblings and loss to the estate/trust assets. The court gave numerous specific and detailed examples of Jane's wrongful conduct and misuse of her authority. Jane appealed from this judgment and this appeal is

pending separately before this court.<sup>5</sup>

## DISCUSSION

### *I. Removal of Jane as Personal Representative of Estate and Trustee of Trusts*

Jane challenges the court's order removing her as trustee of the Trusts and personal representative of Mother's estate. In ruling on this challenge, we agree with Jane that the factual record shows the court permanently removed her from these offices, and did not (as the Brothers suggest in their appellate brief) merely suspend Jane's powers pending the December 2011 hearing. We nonetheless conclude the court's removal order was within its discretion and there was no prejudicial error.

#### *A. Generally Applicable Legal Principles*

A probate court has broad equitable powers to supervise the administration of a trust and an estate. The court has the responsibility "to protect the estate and ensure its assets are properly protected for the beneficiaries." (*Estate of Ferber* (1998) 66 Cal.App.4th 244, 253.) The court has the inherent equitable power to "take remedial

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<sup>5</sup> On our own motion, we take judicial notice of the December 16, 2011 judgment and statement of decision. Although generally a Court of Appeal reviews only those matters occurring before the challenged order (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3), exceptions to this rule apply when subsequent events have substantially affected the continuing validity of the challenged orders. (See *Reserve Insurance Co. v. Pisciotto* (1982) 30 Cal.3d 800, 813.) Here, the fact that the court held an evidentiary hearing on issues directly related to Jane's actions as personal representative/trustee are relevant to the court's removal order and Jane's continued fitness to serve as trustee/personal representative. However, in this appeal, we do not assume the truth of the court's December 16 findings because our focus is on the factual record before the court at the time it made the challenged rulings.

action" and to " 'intervene to prevent or rectify abuses of a trustee's powers.' " (*Schwartz v. Labow* (2008) 164 Cal.App.4th 417, 427.)

As part of these broad powers, a probate court has the authority to remove a personal representative or trustee based on a party's motion or on its own motion. (§ 8500, subd. (b) [removal of a personal representative]; § 15642, subd. (a) [removal of a trustee].) The Legislature has identified several specific grounds to remove a trustee or personal representative, including the trustee's breach of trust, unfitness to act, and failure to act, and the personal representative's mismanagement, fraud, or neglect of the estate. (§§ 8502, 15642, subd. (b).) Under both statutes, these grounds for removal are not exclusive; the court may remove the trustee or executor for any other good cause, including to protect the estate and/or trust assets. (§§ 8502, subds. (d), (e), 15642, subd. (b)(6).)

A trial court has broad discretion in determining whether to remove a trustee or personal representative under the applicable statutes. (See *Estate of Gilmaker* (1962) 57 Cal.2d 627, 633; *Estate of Cole* (1966) 240 Cal.App.2d 324, 328; *Jones v. Stubbs* (1955) 136 Cal.App.2d 490, 502.) Discretion is abused only when the trial court " 'exceeds the bounds of reason, all of the circumstances before it being considered.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566; see *In re Marriage of Berland* (1989) 215 Cal.App.3d 1257, 1261-1262.)

## B. Analysis

### 1. Court's Failure To Issue a Statutory Citation

Jane initially contends her removal as trustee/personal representative must be reversed because the court failed to issue a statutory "citation" under section 8500, subdivision (b). That code section states: "On a petition for removal, or if the court otherwise has reason to believe from the court's own knowledge or from other credible information . . . that there are grounds for removal, *the court shall issue a citation to the personal representative to appear and show cause why the personal representative should not be removed.*"<sup>6</sup> (§ 8500, subd. (b), italics added.)

The record shows that before the June 23 hearing, the Brothers filed a petition to remove Jane as personal representative of Mother's estate. Jane had notice of the petition and was aware the removal issue would be one of the matters to be discussed at the hearing, and she appeared at the June 23 hearing. During the hearing, the court asked numerous questions regarding Jane's handling of the estate and Trusts, and Jane had full opportunity to answer those questions and respond to the Brothers' claims. Jane stated at this hearing that she was prepared to submit the matters (including the Brothers' claims that she should be surcharged for breaches of fiduciary duty and constructive fraud) on the papers in the superior court file and that additional evidentiary hearings were unnecessary.

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<sup>6</sup> We note this citation requirement applies only to the proposed removal of a personal representative (and not a trustee). (§ 8500, subd. (b).) In her appellate briefs, Jane does not raise any similar procedural challenge to her removal as a trustee.

On this record, there was no prejudicial error in the court's failure to issue a section 8500, subdivision (b) citation to appear.

First, Jane forfeited the argument by failing to notify the court of the defect. " 'An appellate court will not consider procedural defects or erroneous rulings where an objection could have been, but was not, raised in the court below.' " (*Children's Hospital & Medical Center v. Bontá* (2002) 97 Cal.App.4th 740, 776.)

Second, the citation requirement is a procedure by which a fiduciary may be brought before the court to respond to allegations of misconduct. (See *McAuliffe v. Coughlin* (1894) 105 Cal. 268, 270.) "In a probate proceeding the court has jurisdiction of the rem. The [statutory] citation [requirement] is to give notice of a proceeding and to procure the presence of the persons involved. It is not jurisdictional in the same sense that a summons may be." (*Estate of Palm* (1945) 68 Cal.App.2d 204, 214.) Accordingly, voluntary participation in the proceedings waives any necessity for compliance with the formalities of a citation. (*Id.* at pp. 213-214.)

In this case, Jane did appear, had the opportunity to submit written opposition to the Brothers' petitions, and orally argued the issues before the court. The transcript of the June 23 hearing shows the court fully considered the relevant facts and law pertaining to the removal issue and allowed Jane to defend her actions as trustee/personal representative. At the hearing, Jane repeatedly urged the court to resolve all of the issues based on the materials contained in the superior court files and on the evidence before the

court. Under these circumstances, the lack of a statutory citation did not detrimentally affect Jane's rights or undermine the validity of the proceedings.<sup>7</sup>

## *2. Challenge to Court's Stated Grounds for Removal*

As the centerpiece of her appeal, Jane contends the court erred because it removed her as a trustee primarily because the family was "dysfunctional" and this is not a proper reason for removal under the statute. Jane maintains that the court erred because the statute identifies only conflicts "among cotrustees" as a basis for removal (§ 15642, subd. (b)(3)), and does not refer to conflicts between a trustee and a beneficiary.

The argument is without merit. The statute provides a trial court with broad discretion to remove a trustee, even if the grounds for the removal are not specifically identified in the statute. (§ 15642, subd. (b)(6).) The court found that the personal animosity between Jane and the Brothers had created a situation where Jane could not effectively administer the trust and effectuate her parents' intent. This finding was a proper basis for removal. "Hostility between the beneficiary and the trustee is a ground for removal of the trustee when the hostility impairs the proper administration of the trust." (*Estate of Gilmaker, supra*, 57 Cal.2d at p. 632; *Brown v. Memorial Nat. Home Foundation* (1958) 162 Cal.App.2d 513, 534 [superseded by statute on another ground].)

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<sup>7</sup> In her appellate oral argument, Jane's counsel asserted that Jane needed more time to prepare to respond to the allegations and to retain new counsel. Jane, however, did not raise these objections in the proceedings below. Jane never asked the court for more time or for a continuance to allow her to retain counsel.

Moreover, the family's "dysfunction" was not the sole reason for the court's removal order. The court gave numerous other reasons for the removal, including: (1) Jane had failed to make reasonable efforts to distribute the assets as required by the estate and trust documents, despite that Mother had died more than six years earlier; (2) the lengthy litigation history had resulted in "huge attorney fees and administrative claims" that have "overwhelmed" the estate/trust assets; (3) Jane had declared bankruptcy on one of the Trusts, leading to "a strong inference" that she had failed to perform her duties; (4) Jane actively resisted the Brothers' efforts to obtain information and records regarding her actions as fiduciary; and (5) Katherine's interests were not being protected while Jane and the Brothers were litigating the issues. These are proper and valid reasons for the court's decision to remove Jane as a trustee and personal representative. (See §§ 8502, 15642, subd. (b).)

Jane contends the court's concern with Katherine's interests was inappropriate because at the June 23 hearing Katherine specifically said she wanted Jane to continue acting in the trustee/personal representative role. However, Katherine had never been represented by counsel in the proceedings, and six years after Mother died, she had not received distributions to which she was entitled. Although she appeared to be aligned with her sister Jane at the hearings, there was no showing Jane was acting to protect her sister's interests. Additionally, the court noted that Katherine's assets under the estate documents were to be given to her under a protective trust. On this record, the court had a valid basis to conclude Katherine's support for Jane's continued service was made without full knowledge of the relevant facts and/or of her legal rights.



### 3. *Substantial Evidence Challenge*

Jane alternatively contends the court's removal order was not supported by the facts or any evidence in the record. This argument is waived because Jane did not provide a sufficient record to examine this contention.

It is a fundamental tenet of appellate law that the lower court's judgment is presumed to be correct. As the party seeking reversal, it is the appellant's burden to provide an adequate record to overcome the presumption of correctness and show prejudicial error. (See *Denham v. Superior Court*, *supra*, 2 Cal.3d at p. 564; *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132.) We are required to make all reasonable inferences favoring the court's order, and must affirm the judgment if any possible grounds exist for the trial court to have reached its factual conclusions. (See *Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416; *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447-448.)

In reaching its conclusion that removal of Jane as trustee/personal representative was necessary to protect the estate/trust assets, the court indicated it was relying, in part, on written information submitted by the parties. However, Jane did not designate the parties' written submissions to be included in the appellate record (except for her own case management conference statement that consists primarily of Jane's unsupported claims). Without an examination of the written motions and any accompanying declarations in the file, we must presume the facts supported the court's findings. An appellant who attacks a judgment, but supplies an inadequate factual record, is precluded from asserting that the evidence was insufficient to support the judgment. (*City of Chino*

*v. Jackson* (2002) 97 Cal.App.4th 377, 385.) In the absence of a complete record, we cannot evaluate issues requiring a factual analysis and must presume "the trial court acted duly and regularly and received substantial evidence to support its findings." (*Stevens v. Stevens* (1954) 129 Cal.App.2d 19, 20; see *Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, 1003; *Hodges v. Mark* (1996) 49 Cal.App.4th 651, 657.)

#### 4. *Claim that Court Had Previously Denied Removal Motion*

Jane additionally argues her removal was improper because the court made this ruling "just weeks" after a different judge denied a similar petition filed by the Brothers. This argument is unsupported by the factual record. There is nothing in the appellate record showing the contents or nature of the Brothers' prior petition or the reasons another judge had previously denied the petition. Without information as to whether the facts underlying both petitions were identical and whether the court previously reached the merits of the issues, we cannot rule on Jane's argument that the Brothers were precluded from bringing the removal petition or the court was estopped from ruling on the petition.

Jane also contends that the judge who issued the removal order, Superior Court Judge Richard Cline, could not have fairly ruled on the issues because he was assigned to the case only two days before the hearing and thus could not have adequately reviewed all of the relevant records. However, Judge Cline's comments at the hearing show he was very familiar with the relevant facts, including the lengthy litigation history and the current problems with the Del Mar beach house and the undeveloped lots. Additionally, the assertion that Judge Cline presided over the case for only "two days" is contradicted

by the fact that Judge Cline had presided over the case several years earlier in ruling on the Brothers' safe harbor petitions. (*Schooler I, supra.*) Absent an indication to the contrary, we are required to presume the court reviewed all relevant documents. (Evid. Code, § 664.)

## II. Court's Appointment of Gloria Trumble as Interim Trustee

Jane contends the court erred in appointing Trumble because: (1) Jane did not have proper notice of the appointment; and (2) the appointment was inconsistent with the automatic stay provisions of section 1300. These arguments are without merit.

First, with respect to the notice issue, at the June 23 hearing the court ordered the Brothers' counsel to provide Jane with the names of three proposed fiduciaries, and gave Jane 10 days to review these choices and select one of these trustees or schedule an ex parte hearing to raise any issues with this procedure. However, Jane apparently failed to respond to the Brothers' choices by the 10-day deadline. Thus, at the July 18 hearing, the court selected Trumble, a professional neutral fiduciary. The record shows Jane had full notice of the process by which a successor trustee would be appointed, and had the opportunity to select one of three proposed trustees or to object to the Brothers' entire list. There was no notice error.

We also find unavailing Jane's contention that the court erred in refusing to withdraw its order after she filed the notice of appeal challenging her removal as trustee and personal representative. Immediately after Jane notified the court that she had filed the appeal, the court *agreed* with Jane that it did not have the authority to appoint a successor trustee while the appeal was pending, and thus *rescinded* this order and

scheduled another noticed hearing to address the issue whether an *interim* trustee should be appointed while the instant appeal was pending. After giving the parties the opportunity to brief the issues and argue at the subsequent August 10 hearing, the court concluded that Trumble was an appropriate independent officer to serve as interim trustee pending the resolution of this appeal.

The court's rulings were proper. Section 1300, subdivision (g) provides that a party may appeal from an order removing a fiduciary. Generally, an appeal challenging the removal of a fiduciary under section 1300 stays the operation and effect of the removal order. (§ 1310, subd. (a).) However, section 1310, subdivision (b) provides an exception to the stay rule: "Notwithstanding that an appeal is taken from the judgment or order, for the purpose of preventing injury or loss to a person or property, the trial court may direct the exercise of the powers of the fiduciary, or may appoint a temporary guardian or conservator of the person or estate, or both, or special administrator or temporary trustee, to exercise the powers, from time to time, as if no appeal were pending."

At the August 10 hearing, the probate court specifically discussed this statutory exception, and recognized that during the pendency of the appeal, it had the choice of specifically directing the exercise of Jane's powers or of appointing a temporary administrator to exercise the powers of the personal representative and trustee as if no appeal were pending. After examining these choices, the court found that it was appropriate to appoint an interim trustee/personal representative to preserve and protect the trust/estate assets. The court's ruling was within its discretionary powers.

Jane argues section 1310, subdivision (b) does not apply here because her appeal was directly related to her removal and Trumble's appointment. However, the purpose of the section 1310, subdivision (b) exception is to provide the court with the discretion to lift the automatic stay to ensure that the trust/estate assets are protected while the issues are pending on appeal. Although generally a removal order challenged on appeal is stayed, a trial court has the discretion to remove that stay and appoint a temporary administrator if the appointment is necessary to "prevent[] injury or loss to a person or property." (§ 1310, subd. (b).) That is precisely the circumstances occurring in this case.

We further reject Jane's argument that Trumble's interim appointment violated section 15660.

Section 15660 governs the appointment of a trustee when the trustee position has become vacant. It provides in relevant part: "(b) If the trust instrument provides a practical method of appointing a trustee or names the person to fill the vacancy, the vacancy shall be filled as provided in the trust instrument. [¶] (c) If the vacancy in the office of trustee is not filled as provided in subdivision (b), the vacancy may be filled by a trust company that has agreed to accept the trust on agreement of all adult beneficiaries who are receiving or are entitled to receive income under the trust or to receive a distribution of principal if the trust were terminated at the time the agreement is made. . . . [¶] (d) If the vacancy in the office of trustee is not filled as provided in subdivision (b) or (c), on petition of any interested person or any person named as trustee in the trust instrument, the court may, in its discretion, appoint a trustee to fill the

vacancy. . . . In selecting a trustee, the court shall give consideration to any nomination by the beneficiaries who are 14 years of age or older."

Jane contends Trumble's appointment was improper under this code section because the selection of Trumble was inconsistent with the express terms of the Trusts, which she says identifies an "institution" as the third successor trustee. This argument is unavailing because the record does not contain a copy of the terms of the Trusts. An appellant has the burden to show error by an adequate appellate record, and we cannot evaluate Jane's contention without examining the Trusts' terms. Further, because the court appointed Trumble solely as an interim trustee, it was not necessarily required to follow section 15660.

In her appellate briefs, Jane also contends that Katherine was a *cotrustee* (and not a successor trustee) for one of the Trusts, and thus the court erred by appointing Trumble without formally removing Katherine as a cotrustee. Because the argument is unsupported by a citation to the factual record showing Katherine was a cotrustee, we reject the argument on this appeal.

Upon remand, the probate court should hold a hearing and determine whether Trumble is an appropriate permanent replacement administrator for all future acts under the terms of Mother's will and Trusts and under section 15660, and should address the issue whether Katherine was a cotrustee (rather than a successor trustee) of one of the trusts. At this hearing, the court should be mindful that section 15660 expressly defers to the terms of the trust instrument as providing the preferred basis for determining how a vacancy in the office of trustee is to be filled. However, in determining the appropriate

replacement trustee/personal representative, the court has broad discretion and should appoint only trustees who are qualified and fit to perform the duties required of the office.

#### DISPOSITION

Orders affirmed. Appellant to bear respondents' costs on appeal.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.